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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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6

7 UNITED STATES OF AMERICA,

No. CR 06-00189 SBA

8

Plaintiff.

ORDER

9

v.

10 MICHAEL GREEN JOHNSON, et al.,

[Docket No. 28]

11

Defendants.

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13 This matter came before the Court on the United States' Appeal of Magistrate's Pre-Trial Release
14 Order for Defendant Sherman Gay ("Appeal"). Having read and considered the papers filed in
15 connection with this Appeal, the arguments advanced by the parties at the hearing, and being fully
16 informed, the Court hereby GRANTS the United States' Appeal for the reasons set forth herein and on
17 the record at the April 4, 2006 hearing.

18

BACKGROUND

19 According to the March 13, 2006 Criminal Complaint filed in this matter, on or about January
20 4, 2006, Defendant Sherman Gay ("Defendant") purchased 194.5 grams of a mixture or substance
21 containing 77.8 grams of actual methamphetamine from alleged Project Trojans¹ member and co-
22 defendant Bobby Ray Williams. The exchange of drugs for cash was observed by FBI agents and
23 Contra Costa County Sheriff's Office ("CCCSO") deputies. Following the transaction, the agents and
24 deputies followed Defendant's vehicle as it entered Interstate 80 toward Sacramento. When a CCCSO
25 patrol unit attempted to conduct a traffic stop, Defendant refused to stop and continued to drive
26 eastbound. As Defendant drove across the Carquinez Bridge, he threw the methamphetamine he had

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¹Project Trojans is a violent street gang that controls the narcotics trade within North Richmond, California. Defendant is not alleged to be a member of Project Trojans.

1 just purchased out of the passenger side window of his truck, which was immediately recovered by
2 pursuing officers. Defendant finally yielded to the authorities before entering the toll plaza on the east
3 side of the bridge. Defendant was subsequently arrested for possession of methamphetamine for sale.
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5 Following his arrest, Defendant was advised of his Miranda rights, waived them, and agreed to
6 speak with deputies. Defendant admitted that he had purchased methamphetamine from Bobby Ray
7 Williams on that night and others in order to sell methamphetamine in smaller quantities in the
8 Sacramento area. Defendant was not charged at that time and was not told that he was the subject of
9 a larger federal investigation.

10 On March 13, 2006, Magistrate Judge Zimmerman signed a Criminal Complaint charging
11 Defendant and fourteen others with a narcotics trafficking conspiracy. On March 14, 2006, Defendant
12 was arrested by CCCSO and brought to the FBI. Later that day, he appeared before Magistrate Judge
13 Zimmerman and requested a detention hearing before Magistrate Judge Brazil.

14 On March 22, 2006, Defendant appeared before Magistrate Judge Brazil for a detention hearing.
15 At the hearing, the Government moved for detention on the grounds that Defendant is a danger to the
16 community and a flight risk. Magistrate Judge Brazil ordered that Defendant be released to his home
17 in Sacramento on electronic monitoring following the posting of a \$250,000 bond secured by
18 approximately \$160,000 to \$180,000 in equity of a home owned by Defendant's girlfriend, Andrea Gant
19 ("Gant"), and Gant's adult daughter, Rashida Maire Polk. Defendant's sister, Bridgette Gay, and brother,
20 Tarianna Gay, were also asked to co-sign on the bond as sureties. The Government immediately
21 requested that the Order be stayed until 5:00 p.m. on March 23, 2006 to allow the Government to file
22 an appeal.

23 On March 23, 2006, the Government filed the instant Appeal.

24 **LEGAL STANDARD**

25 If a person is ordered released by a magistrate, the attorney for the Government may file, with
26 the court having original jurisdiction over the offense, a motion for revocation of the order or
27 amendment of the conditions of release. 18 U.S.C. § 3145 (a). Motions to review or to amend bail
28 orders by magistrate judges are reviewed *de novo*. United States v. Koenig, 912 F.2d 1190, 1192 (9th

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1 Cir. 1990).

2 The Bail Reform Act requires the release of a person facing trial under the least restrictive
3 condition or combination of conditions that will reasonably assure the appearance of the person as
4 required and the safety of the community. 18 U.S.C. § 3142(c)(2); United States v. Motamedi, 767 F.2d
5 1403, 1405 (9th Cir.1985). The government must establish danger to the community under a clear and
6 convincing standard and flight risk under a preponderance of the evidence standard. Motamedi, 767
7 F.2d at 1406. However, in cases involving narcotics offenses, the Bail Reform Act establishes a
8 rebuttable presumption that the defendant is both a flight risk and a danger to the community. 18 U.S.C.
9 § 3142(e). The presumption exists if there is "probable cause" that the defendant committed a narcotics
10 offense for which a maximum term of imprisonment of ten years or more is prescribed. Id. A grand
11 jury indictment suffices to establish "probable cause" under 18 U.S.C. § 3142. United States v. Vargas,
12 804 F.2d 157 (1st Cir. 1986). Once the presumption is triggered, the defendant has the burden of
13 producing or proffering evidence to rebut the presumption. United States v. Hare, 873 F.2d 796, 798
14 (5th Cir. 1989). However, the defendant only has the burden of producing rebutting evidence, not the
15 burden of persuasion. United States v. Reuben, 974 F.2d 580, 586 (5th Cir. 1192).

16 If the defendant proffers evidence to rebut the presumption, the Ninth Circuit has identified
17 several factors that the Court must take into account when determining whether pretrial detention is
18 appropriate: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence
19 against the person; (3) the history and characteristics of the person, including his character, physical and
20 mental condition, family ties, employment, financial resources, length of residence in the community,
21 community ties, past conduct, history relating to drug and alcohol abuse, criminal history, record
22 concerning appearance at court proceedings, and (4) the nature and seriousness of the danger to any
23 person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g); Motamedi,
24 767 F.2d at 1407. In making its ultimate determination, the court may still consider the finding by
25 Congress that drug offenders pose a special risk of flight and dangerousness to society. Reuben, 974
26 F.2d at 586.

27 **DISCUSSION**

28 In the instant Appeal, the Government argues that Defendant has not presented any facts

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1 sufficient to rebut the legal presumption that he is a danger and a flight risk. In support of this argument,
2 the Government focuses on two assertions: (1) that Defendant's sureties are "dubious" because one
3 surety, Andrea Gant, has sustained convictions for narcotics trafficking, theft, and forgery, and because
4 another surety, Defendant's brother, has also been convicted of drug trafficking; and (2) that electronic
5 monitoring will not prevent Defendant from continuing to engage in drug trafficking from his house.

6 Considering Defendant's sureties first, the Court finds that Ms. Gant's extensive criminal history
7 does not provide the Court with the type of assurances that are typically provided when a surety is
8 willing to sign a property bond. For example, Ms. Gant has sustained misdemeanor convictions for
9 grand theft and petty theft. She has also sustained felony convictions for selling controlled substances
10 and possession of forged notes. Although some of these convictions were sustained over twenty years
11 ago, it is the nature of the convictions that the Court finds troubling, particularly in light of her
12 association with Defendant, who is charged with a very serious narcotics offense.

13 Further, of primary concern to the Court is Defendant's inability to persuade the Court that the
14 conditions imposed by Magistrate Judge Brazil are sufficient to overcome the presumption that
15 Defendant is a flight risk *and* a danger to the community. For example, having reviewed United States
16 v. O'Brien, 895 F.2d 810, 816 (1st Cir. 1990), the Court does not agree with Defendant that it is clearly
17 established the condition of home detention with electronic monitoring, alone, is sufficient to overcome
18 the presumption. In fact, in O'Brien, the First Circuit affirmed the magistrate judge's pretrial release
19 order only after expressly noting that the magistrate had imposed conditions in *addition to* electronic
20 monitoring. Id. ("The magistrate, however, did not rely entirely on the bracelet in finding that O'Brien
21 had rebutted the presumption. She also considered the availability of a surety which, by all appearances,
22 is so vital to defendant that he sought hard and long to avoid offering it.").

23 Moreover, the Court finds that Defendant has simply been unable to sufficiently address the
24 Court's concerns regarding the possibility that Defendant could continue to engage in drug trafficking
25 while under home detention. Although Defendant contends that the possibility of further drug
26 trafficking has now been eliminated by the arrest of his supplier, the Court is mindful of the fact that
27 there are countless ways that drug trafficking can continue, even when the original source of choice has
28 been removed. The Court is also mindful of the fact that drug trafficking is a lucrative cash business,

which can easily be conducted from the home, and which can easily supply Defendant with sufficient funds to abscond from custody were he so inclined. Thus, as stated by the Court at the hearing, while electronic monitoring would be useful in the sense that it would alert the Court as to *whether* Defendant has fled, it is not actually useful for preventing escape in the first place. Further, having considered Defendant's background and overall criminal history, the Court does not agree with Defendant that it can comfortably assume that Defendant would be more likely to place the needs and financial future of his family over his own needs.² The Court reaches this conclusion even in light of the testimony presented to the Court which suggests that Defendant may have been aware of the seriousness of the instant charges as early as January 2006.

10 Thus, although the Court is mindful of the fact that Defendant's burden is slight, the Court finds
11 that Defendant has not met his burden in producing credible evidence that there are conditions of release
12 that will reasonably assure that Defendant is not a danger or flight risk. Since the Court concludes that
13 Defendant has not offered enough evidence to rebut the presumption that he is a flight risk and danger
14 to the community, the Court need not proceed to separate analysis of the factors set forth in 18 U.S.C.
15 § 3142(g). However, the Court hereby finds that these factors also strongly favor detention.

16 For example, with respect to the nature and seriousness of the offense, the Court concludes that
17 this factor weighs heavily in favor of detention. Indeed, the grand jury has indicted Defendant for
18 conspiring to distribute and possess with intent to distribute over 5 kilograms of cocaine, over 50 grams
19 of cocaine base, over 500 grams of a mixture or substance containing cocaine base, and over 50 grams
20 of pure methamphetamine. Defendant is specifically charged with possession with intent to distribute
21 over 50 grams of pure methamphetamine. Moreover, due to Defendant's three prior narcotics felony
22 convictions, Defendant faces a mandatory minimum sentence of life imprisonment without release if
23 the Government files an information alleging these convictions.³ It is therefore without question that
24 the instant charges are of a very serious nature.

²⁶To the contrary, it appears from Pretrial Services' report that Defendant has been depleting his parents' financial resources by relying on the disability aid they receive, rather than earning his own lawful income.

³Even if Defendant had not sustained any prior convictions for a felony drug offense, he would still be facing a mandatory minimum sentence of not less than ten years imprisonment.

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1 With respect to the weight of the evidence, although this is the least important factor due to the
2 early stage of the instant proceedings, the Court finds that this factor also favors detention. Although
3 Defendant points out that he has not yet received any discovery from the Government and therefore is
4 not in the position to comment on it, the Government maintains that the evidence against Defendant is
5 "damning." Specifically, the Government relies on the fact that Defendant was intercepted on a wire
6 tap ordering narcotics and was observed to be purchasing narcotics. Thus, it appears to be beyond
7 dispute that – due to the fact that several agents witnessed Defendant's actions – the weight of the
8 evidence against Defendant is fairly substantial.

9 As to Defendant's history and characteristics, this factor also weighs in favor of detention.
10 Defendant's criminal history is extensive. Defendant has sustained two felony narcotics trafficking
11 convictions, one felony narcotics possession conviction, one conviction for possession of a firearm, and
12 two convictions for obstructing/resisting officers. Defendant has also previously violated the terms of
13 his probation.

14 Although Defendant argues that he has substantial ties to Sacramento and the Bay Area, and is
15 the primary care-giver for his elderly and infirm father, the Court is troubled by the fact that Defendant
16 engaged in the instant conduct while presumably responsible for his father's care. The Court also finds
17 Defendant's argument substantially undermined by the fact that he appears to have subsisted solely on
18 his parents' aid, rather than having sought and maintained gainful employment.

19 Finally, as to the danger to the community, the Court finds that the Government has persuasively
20 shown that Defendant poses a heightened risk due to the strong likelihood that he will continue to
21 engage in drug trafficking activities. This conclusion is supported by the finding by Congress that drug
22 offenders pose a special risk of flight and dangerousness to society. Reuben, 974 F.2d at 586.

23 After considering all of the relevant factors, the Court finds that the Government has established
24 by clear and convincing evidence that there are no conditions that would reasonably assure the safety
25 of the community. For the same reasons, the Court finds that the Government has established by
26 preponderance of evidence that there are no conditions that would reasonably assure Defendant's
27 appearances in court.

28

CONCLUSION

IT IS HEREBY ORDERED THAT the United States' Appeal of Magistrate's Pre-Trial Release Order for Defendant Sherman Gay [Docket No. 28] is GRANTED.

IT IS SO ORDERED.

Dated: 4/10/06

Sandra B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge